BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	))	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	))	MM Docket No. 87-8

To: The Commission

REPLY COMMENTS OF THE JET BROADCASTING CO., INC.

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TABLE OF CONTENTS

Summary

The Jet Broadcasting Co., Inc. ("Jet"), licensee of Stations WJET-TV, Channel 24, and WJET(FM), Erie, Pennsylvania, urges the Commission to repeal the one-to-a-market rule and prohibit television local marketing agreements ("LMAs") insofar as they permit a single entity to operate one half or more of a market's television stations.

Jet brings to this proceeding a unique perspective. As a grandfathered exception to the one-to-a-market rule, Jet's operation of both a radio station and a television station demonstrates that cross-ownership can foster competition without sacrificing diversity. Moreover, unlike the majority of commenting parties in this proceeding, Jet is a small market licensee. Thus, it can attest to the effects that cross-ownership and LMAs have in small markets.

I. One-to-a-Market Rule

Earlier in this proceeding, Jet urged the Commission to eliminate the one-to-a-market rule, demonstrating that cross-ownership of radio and television stations poses no harm to competition or diversity, rather it can stimulate both. Most parties commenting on the one-to-a-market rule favor its repeal. However, this position is not universal. Opponents of the one-to-a-market rule's repeal argue that cross-ownership (1) results in a reduction of the number of independent media voices and a correlative loss in diversity and (2) contravenes Congress' will.

Jet demonstrates that the traditional notion that outlet diversity directly correlates to viewpoint diversity is no longer a valid assessment of the realities of the broadcast industry, so long as there is not undue concentration in either television or radio ownership. Radio and television are not fungible. They satisfy different needs of different consumers. Thus, they do not directly compete against one another. Cross-ownership, however, permits the common

operator to achieve certain efficiencies, e.g., shared overhead costs. In turn, these savings can be reinvested in the stations to improve their offerings to the public. Hence, cross-ownership enhances the public interest by stimulating competition and diversity, dictating that the one-to-a-market rule should be repealed.

II. Television Local Marketing Agreements

Several observations may be made based on the comments received thus far in this rule making matter. Support for LMAs was rallied by commenting parties. However, certain qualifications should be considered about those touting LMAs as a means to foster competition without harming diversity. Many of the parties commenting on LMAs are participants in LMAs themselves. Many of those parties represent the "cash-rich" brokering stations who saved the "financially-unstable" brokered stations. Some were the gratified brokered stations which, courtesy of LMAs, are now viable contenders in their markets. Noticeably less verbal were the comments of "non-participants" which suffer as a result of LMAs in their markets. Less verbal, maybe, but not completely silent. Commenting parties like Jet and Centennial describe a perspective to which little consideration has been given up until this point. Now, the Commission can no longer turn a deaf ear of the pleas for help of those who are suffering serious repercussions because of LMAs.

In small television markets, LMAs indisputably help the participating stations. They also, however, deal a serious blow to non-participating stations. Stations that were once struggling to remain viable programming alternatives combine through LMAs and become financially secure. However, in small markets, the economic strength gained by the LMA'd stations comes at a price to the singleton stations. Small markets are small for a reason -- there are insufficient consumer demand and funding available to support numerous, diverse sources of information. Thus, since the small market is only capable of supporting a finite number of information sources, an LMA threatens the continued survival of the singleton station. Singleton stations are no longer able to compete with the more powerful combinations -- LMAs, in small markets, destroy the level playing field. Therefore, to permit LMAs in small television markets consisting of four or fewer stations would signal the Commission's judgment that its concerns for competition and diversity are meaningless.

Insofar as Congress has determined that LMAs should be grandfathered, Jet submits that Congress did not intend grandfathering of small market LMAs if they were harmful to competition and diversity. Because LMAs, in reality, stifle competition and diversity in small television markets, they should not be entitled to grandfathering. The Commission should require termination within 90 days of the effective date of the Commission's rules for those LMAs which vest in a single entity the power to operate one half or more the market's television stations.

Moreover, the date after which LMAs are no longer qualified for grandfathering is not November 5, 1996, as the Commission proposes, but February 8, 1996, the date the Telecommunications Act of 1996 was enacted. A two-tier approach should be implemented for determining which LMAs are entitled to grandfathering -- for LMAs subject to review under the Commission's interim policy and for LMAs not subject to Commission review.

To be eligible for grandfathering, LMAs that are subject to Commission review pursuant to the interim policy must have been approved by final order and implemented insofar as the brokering station has commenced to provide programming on the brokered station, all before February 8,

1996. For LMAs not subject to Commission review, eligibility should be predicated upon implementation of an LMA agreement, by providing programming for the brokered station on or before February 8, 1996.[1]

[1] In the event an allegation of violation of the Commission's rules was raised against the LMA before February 8, 1996, and the Commission in fact found such a violation, the otherwise eligible LMA should have to terminate effective immediately upon such finding.

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REPLY COMMENTS OF THE JET BROADCASTING CO., INC.

The Jet Broadcasting Co., Inc. ("Jet"), licensee of Stations WJET-TV, Channel 24, and WJET(FM), Erie, Pennsylvania, through its attorneys, submits its comments with respect to the Second Further Notice of Proposed Rule Making ("SFNPRM") in the above-captioned proceedings. Specifically, Jet further comments on the "one-to-a-market" rule and television local marketing agreements ("LMAs").

I. Introduction

Having reviewed the substantial number of comments filed in this proceeding, Jet is compelled to caution the Commission against promulgating rules of general applicability without paying considerable attention to less prominently made arguments. In terms of competition and diversity, it is quite clear that each television market is unique. Therefore, it would be unwise to establish hard and fast rules with respect to television LMAs that equally apply to large and small markets alike. Rather, as will be demonstrated, the propriety of particular LMAs is predicated upon many variables, including the number of stations in the market. Thus, while mindful of the need for administrative efficiency, Jet will demonstrate that what is good for the goose is not always good for the gander. In other words, the Commission must consider the effects of television LMAs relative to the size of the market.

II. Jet's Perspective

As Jet indicated in its comments in this proceeding, Jet offers a unique perspective. First, Jet is the licensee of both a radio station and a television station in the same market, Erie, Pennsylvania.[1] In addition, the Erie television market is a small market[2] with only four commercial stations (1 VHF and 3 UHF). Moreover, as a singleton station, WJET-TV competes against an LMA involving the market's sole VHF station and another UHF station.

Thus, Jet brings to this proceeding its unique insight as to the following:

- What it means to be a small market licensee.
- The value of repealing the one-to-a-market rule from the small market licensee's perspective.
- As an operator of a station in a small market competing against a television LMA, first-hand experience as to the devastating effect an LMA can have in a small market.

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[1] Jet's common ownership of WJET-TV and WJET(FM) is a grandfathered exception to the one-to-a-market rule.

[2] Jet defines a "small television market" as a market with four or fewer commercial television stations with overlapping Grade A contours.

III. The One-to-a-Market Rule Should Be Eliminated.

Many of the parties commenting on the "one-to-a-market rule" conclude the Commission should repeal the rule,[3] a position with which Jet wholly concurs. Conversely, Spectrum Detroit and Black Citizens for a Fair Media, *et al.* ("Black Citizens") (collectively "Opponents of the One-to-a-Market Rule") are adamantly opposed to repeal of the rule. As explained below, the reasoning of the Opponents of the One-to-a-Market Rule fails to consider the needs of the broadcasting industry as a whole.

Black Citizens argue that repeal of the rule "would diminish the number of independent media voices, thereby reducing the diversity of viewpoints available to the public at the local level." Comments of Black Citizens for a Fair Media et al. at 1. In support of their argument, they suggest that

> [r]egardless of whether [radio and television] are substitutes in the economic sense, both television and radio stations provide local news, issue-responsive programming and public affairs. When such programs are provided by different owners, they are providing diverse viewpoints to the public. Repealing the rule would reduce the number of independent media voices, and hence, the diversity of viewpoints.

Id. at 3.

This argument fails on several accounts. First, as Jet noted in its earlier comments in this proceeding, even the Commission concedes that its traditional notion that outlet diversity

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[3] See Comments of National Association of Broadcasters at 13-16 ("NAB Comments"); Comments of CBS, Inc. at 6-26 ("CBS Comments"); Comments of ABC, Inc. at 8-9 ("ABC Comments"); Comments of Paxson Communications Corporation at 19-22 ("Paxson Comments"); Comments of The Jet Broadcasting Company, Inc. at 6-8 ("Jet Comments"); Comments of Jacor Communications, Inc. at 3-7 ("Jacor Comments").

Sinclair Broadcasting Group, Inc., Pappas Stations Partnership, Shockley Communications Corporation and Glenwood Communications Corporation support at least modifying the existing rules to reflect a different waiver standard.

directly correlates to viewpoint diversity may no longer be a valid assessment of the realities of the broadcast industry. Jet Comments at 8; see Further Notice of Proposed Rule Making in MM Docket Nos. 91-221 and 87-8, 10 FCC Rcd 3524, 3550 (1995) ("FNPRM"). Jet concurs that outlet diversity and viewpoint diversity are not inversely related with the exception of situations in which there is undue concentration in either television or radio station ownership. Jet Comments at 8 (citing Comments of The Jet Broadcasting Co., Inc. in MM Docket Nos. 91-221 and 87-8 (filed May 17, 1995) at 7 ("Jet FNPRM Comments")). Jet, however, suggests that undue concentration within either television or radio may be averted by reliance on "the numerical limitations imposed by the local ownership rules."[4] Jet Comments at 8. Reliance on the local ownership rules will prevent anti-competitive abuses without sacrificing the public interest, thus eliminating the need for the one-to-a-market rule.

Moreover, as Jet has maintained throughout its participation in this rule making proceeding, "radio and television programming are not commodities 'reasonably interchangeable by consumers for the same purposes.'" Jet FNPRM Comments at 6 (citing United States v. E.I. duPont De Nemours & Co., 351 U.S. 377, 394 (1956)). Therefore, radio and television satisfy different needs of different consumers.[5] However, there are certain efficiencies[6] that may be

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[4] ABC lends support for this argument insofar as it suggests that if the Commission decides against elimination of the one-to-a-market rule, it should at least extend its waiver policy to all markets. ABC Comments at 9-10. In the context of the one-to-a-market rule, ABC believes that "[m]arket size per se adds nothing to the analysis of the effect on competition and diversity of a proposed merger." Id. at 10.

[5] As suggested by Paxson, "[v]iewers turn to television, cable television, and alternative video delivery systems; listeners turn to radio stations; and readers turn to newspapers and magazines for different reasons. All these media are sources of news, information and entertainment, but the audience's reliance on and use of each medium depends on variables such
(continued...)

achieved by common ownership of radio and television stations, which savings result in greater resources to spend on increased news and public service programming. Jet Comments at 6. Therefore, in the instance of cross-ownership, consolidation does not negatively impact the public interest[7] but enhances it,[8] mandating that the one-to-a-market rule be repealed.

Spectrum Detroit argues that repeal of the one-to-a-market rule would be contrary to congressional intent. Comments of Spectrum Detroit at 8 ("Spectrum Comments"). A careful reading of the House Conference Report reveals Congress' understanding that the one-to-a-market rule was under review by the Commission. Specifically, language from the Conference Agreement on Section 202(d)[9] of the Telecommunications Act of 1996 ("Telecom Act") reads as follows:

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[5](...continued)
as time and place of use, the information/entertainment desired and similar factors." Paxson Comments at 20.

[6] For example, combined operations of a television station and radio station result in reduced overhead costs and consolidation of certain personnel.

[7] NAB concurs with this statement, favoring repeal of the one-to-a-market rule because it "impose[s] often erratic costs on broadcasters[] and result[s] in no meaningful public interest benefits." NAB Comments at 13.

[8] In its experience, CBS has found that cross-ownership includes the following improvements: (1) radio stations have access to television stations' newsgathering facilities resulting in improved news coverage; (2) radio stations have access to weather forecasting equipment resulting in expanded and improved weather coverage; (3) sharing of reporters, producers and editors resulting in "broader and deeper coverage of community issues and events;" (4) "seamless information on events and issues of importance;" and (5) expanded "reach and power of public service campaigns." CBS Comments at 8-10.

[9] Section 202(d) of the Telecommunications Act of 1996 addresses the one-to-a-market rule. Telecommunications Act of 1996, §202(d), Pub. L. No. 104-104, 110 Stat. 56, 111 (1996).

> [I]n the Commission's proceeding to review its television ownership rules generally, the Commission is considering whether generally to allow such local crossownerships, including combinations of a television station and more than one radio station in the same service. The conferees expect that the Commission's future implementation of its current radio-television waiver policy, as well as any changes to its rules it may adopt in its pending review, will take into account the increased competition and the need for diversity in today's radio marketplace that is the rationale for subsection (d).

H.R. Conf. Rep. No. 458, 104th Cong. 2d Sess. 163 (1996) (emphasis added). Therefore, while the text of subsection (d) states the waiver policy, Congress clearly did not intend to preclude the Commission from acting to repeal the rule altogether.[10]

Stated simply, the Commission is authorized to eliminate the one-to-a-market rule if it finds that such action would not harm competition and diversity. The arguments made by broadcasters, based on their own experience with cross-ownership, demonstrate that cross-ownership of radio and television stations only will serve to foster competition and diversity.

IV. Grandfathering Television LMAs In Small Markets Would Be Detrimental To Competition and The Public Interest

As Jet has previously stated in its comments in this proceeding, it is not steadfastly opposed to all television LMAs nor to the grandfathering of some television LMAs. Jet, however, has expressed concern that television LMAs are detrimental to both competition and diversity in small television markets.[11]

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[10] In addition to being authorized to repeal the one-to-a-market rule, the language in the House Conference Report authorizes the Commission to allow television broadcasters to own the maximum number of radio stations permitted under the local ownership (duopoly) rule.

[11] For Jet's definition of a "small television market," see supra note 2.

Jet is mindful that the majority of commenting parties[12] which address the issue of television LMAs support the grandfathering thereof.[13] However, as explained below in further detail, most commenting parties' arguments do not address the specific concerns raised by Jet. In fact, Jet subscribes to many of the arguments raised in the parties' comments, taking exception mainly to their validity in small markets.

A. Background of Commenting Parties, The Markets In Which They Participate, and The Arguments They Make

Briefly, there are several observations worth noting from the outset:

- Many, if not most, parties commenting on the value of LMAs are participants in LMAs.[14]

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[12] All references to parties' comments refers to those comments filed on February 7, 1997, in response to the Commission's Second Further Notice of Proposed Rule Making in MM Docket Nos. 91-221 and 87-8 (released November 7, 1996), unless otherwise specified.

[13] See, e.g. NAB Comments at 15-22; ABC Comments at 14-15; Paxson Comments at 30-36; Comments of the Local Station Ownership Coalition at 84-91 ("LSOC Comments"); Comments of Diversified Communications at 7-8 ("Diversified Comments"); Comments of Pappas Stations Partnership at 10-14 ("Pappas Comments"); Comments of Shockley Communications Corp. at 1-2; Comments of Waterman Broadcasting Corp. at 2; Joint Comments of Glencairn, Ltd. and WPPT, Inc. on Second Further Notice of Proposed Rule Making and Further Notice of Proposed Rule Making at 2 ("Glencairn/WPPT Comments"); Comments of Miller Broadcasting, Inc. at 5-7 ("Miller Comments"); Comments of the Association of Local Television Stations at 33-37 ("ALTV Comments"); Comments of Sullivan Broadcasting Co., Inc. at 4-7 ("Sullivan Comments"); Comments of Max Media Properties LLC at 7 ("Max Media Comments"); Comments of Blade Communications, Inc. at 6-19 ("Blade Comments"); Comments of AK Media Group, Inc. at 18-19 ("AK Comments"); Consolidated Comments of Sinclair Broadcast Group, Inc. at 1-9; Comments of Benedek Broadcasting Corp. at 7-8 ("Benedek Comments"); Comments of SJL Communications, Inc. at 16-20 ("SJL Comments"); Comments of Kentuckiana Broadcasting, Inc. (Errata) at 7-9 ("Kentuckiana Comments"); Comments of Malrite Communications Group, Inc. at 16-22 ("Malrite Comments").

[14] The following commenting parties have participated in television LMAs: Paxson, Malrite, Waterman, Pappas, Blade, Sullivan, Sinclair, SJL, AK Media, Diversified, Max Media, Miller, Glencairn, and Kentuckiana.

- Of those commentors, many, if not most, represent the brokering station.[15]
- Many of the LMAs described by commentors involved "cash-rich" brokering stations and "cash-poor" brokered stations.[16]
- Many of the brokering stations in television LMAs are group owners.[17]
- Only a couple of commentors addressed the effects of LMAs from the perspective of a singleton station trying to compete against an LMA.[18]
- Many, if not most, of the television LMAs described are in larger markets than those for which Jet expresses concern.[19]

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[15] For example, the following commenting parties have acted as the brokering station in a television LMA: LIN, Paxson, Malrite, Waterman, Pappas, Blade, Sullivan, Sinclair, SJL, AK Media, and Diversified.

[16] See, e.g. Waterman Comments at 3; Comments of LIN Television Corp. at 1; Malrite Comments at 18; Kentuckiana Comments at note 1; Sinclair Comments at 7-8; SJL Comments at 3-9; Miller Comments at 5-7; Max Media Comments at 7; Blade Comments at 7-13; SJL Comments at 6-9, 12.

[17] For example, Pappas, Diversified, Sinclair, AK Media, Sullivan, LIN and Malrite are all group owners who have acted as the brokering station in a television LMA.

[18] See Jet Comments at 8-13; Comments of Centennial Communications, Inc. at 4-6 ("Centennial Comments"); Benedek Comments at 6-7.

[19] As previously noted, Jet's concern is with respect to television LMAs in small television markets, as defined in supra note 2. To the extent commenting parties identified the markets in which they are licensed or have existing LMAs, only the following commenting parties have interests in television markets having four or fewer stations: Malrite, Diversified, Shockley, Benedek, AK Media, Jet, and SJL.

As noted in supra note 2, Jet submits that a television market should be defined in accordance with its Grade A contour. However, for ease of analysis of the number of television markets having four or fewer television stations, Jet has relied on Nielsen's DMA rankings. Therefore, while most often there will be no variation in a television market's composition if the market is defined by its Grade A contour, Jet recognizes that, in some instances, use of the Grade A contour will result in a larger number of markets having four or fewer stations.

- Many commentors argue that the financial harm they would suffer if television LMAs were not grandfathered is sufficient justification for grandfathering LMAs.[20]
- Many commentors suggest that LMAs serve the public interest.[21]
- Many commenting parties suggest that no harm results from LMAs.[22]
- Many commenting parties suggest that grandfathering LMAs is congressionally mandated.[23]

These observations are significant because they demonstrate that those who favor grandfathering of LMAs generally can be categorized as LMA participants in larger markets. It is obvious, therefore, that little consideration has been given to the effects on non-participants, and more particularly, the effects on competition and diversity in small markets from the non-participant's perspective. Hence, it is that much more important that consideration be given to the concerns of non-participating small market stations, such as Jet's.

B. The Non-Participant's Perspective

Jet is compelled, however, to expand on some of the aforementioned observations. As recognized by Benedek, "LMAs unquestionably provide advantages to the participating stations that are not available to non-participating stations in the market." Benedek Comments at 7.

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[20] See, e.g. NAB Comments at 16-17; LSOC Comments at 88-89; Malrite Comments at 20-21; Kentuckiana Comments at 8-9; Blade Comments at 16; Diversified Comments at 5-6; Sinclair Comments at 9.

[21] See, e.g. Pappas Comments at 10-14; Sinclair Comments at 7-8; AK Comments at 18-19; SJL Comments at 6-9; LIN Comments at 17-20; LSOC Comments at 63-64.

[22] LSOC Comments at 88; Diversified Comments at 5; Sullivan Comments at 6.

[23] See, e.g. NAB Comments at 17-18; Blade Comments at 17-19; Sullivan Comments at 5-6; ALTV Comments at 33-37; Sinclair Comments at 4-7; SJL Comments at 16-18.

Only a handful of commenting parties addressed the effects of television LMAs on "non-participants." Benedek gave its support to grandfathering LMAs, even though it was not itself a participant in an LMA. While the example cited by Benedek as illustrative of the benefits of an LMA involved a "small television market," Benedek, as licensee of the market's only VHF station, readily admits that before the LMA, it "faced little effective competition because the UHF stations were not financially viable." Benedek Comments at 6. Benedek continued, adding that with the LMA, the two UHF stations "were able to provide spirited competition to the Benedek VHF station." Id. Insofar as the LMA improved competition in the Meridian, Mississippi market, and thereby served the public interest in this particular instance, this example alone is insufficient to infer that LMAs will always serve the public interest in small television markets.

Centennial, too, offers insight as to the effects of television LMAs on "non-participants." As a non-participant, Centennial offers a perspective different than that of the majority of commenting parties. Therefore, consideration of its comments is of particular importance to the Commission. Centennial observes that the existing LMA in its market (the Norfolk-Portsmouth-Newport News-Hampton DMA) has been detrimental to the public interest, (1) resulting in duplicative programming and a correlative reduction in program diversity and the loss of an independent voice; and (2) conferring upon the brokering station "a distinct competitive advantage in the program distribution and advertising markets." Centennial Comments at 4-5.

It is important to note that the Norfolk-Portsmouth-Newport News-Hampton DMA is comprised of seven television stations, and thus is a larger market than Jet is primarily concerned with. However, Centennial's experience is that much more revealing because it suggests that even in larger markets there may be substantial harm to those stations having to compete with LMAs,[24] not to mention the detriment to the public interest. Therefore, it is only logical to conclude that the problems highlighted by Centennial are even more likely to be found in small markets.

Jet, too, is a "victim" of a television LMA in its market and therefore offers the Commission its experience as a "non-participant." In its comments, Jet describes the competitive advantage enjoyed by the brokering station because its savings, resulting from the consolidation of operations, may be spent on more desirable programming, enabling the LMA'd stations to attract larger audiences. Jet Comments at 10. Because of the appeal to larger audiences, advertisers are prone to advertise on the LMA'd stations, notwithstanding the combined entity's ability to demand higher advertising rates.[25] Id. In addition, the greatest

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[24] In particular, Centennial points out that since the LMA's implementation, it has lost a "significant programming source" (Notre Dame football) and is "unable to bid on certain syndicated programming." Centennial Comments at 5.

[25] In its comments, Pegasus, defending the need to allow LMAs as a means to enhance competition in smaller markets, argues:

> [S]maller markets tend to be characterized by lower revenues per household and greater market concentration. This situation is in part the result of the ability of a few market-dominant VHF stations to keep advertising rates low. This has the result of keeping competition out of the market, or making what competition that does exist weaker because of the lower than expected revenues that the competition can earn. Allowing for combinations of local television stations should give these competitors more clout with advertisers, allowing advertising rates to rise to their expected levels and allowing these stations to become more truly competitive with the dominant stations in their markets.

Comments of Pegasus Communications Corp. (Corrected Version) at 15.

First, Jet presumes that Pegasus did not intend to preclude the argument that any "market-dominant" station (not merely a VHF station) can keep advertising rates low. In terms of the ability of the market-dominant station to maintain low advertising rates, Jet does not disagree. Market-dominant stations often keep their prices artificially low to financially cripple

(continued...)

advantage the combined entity has is the inventory of advertising spots it can sell because it programs two stations. This affords the combined entity the opportunity to offer advertisers more attractive packages, e.g. volume discounts. To the singleton stations competing with an LMA, the resulting loss of advertising revenue significantly reduces their ability to provide attractive programming, which ultimately results in the stations' being driven off the air. Id.

Moreover, as Jet has previously suggested, diversity in small television markets suffers if LMAs are permitted. Id. There is a noticeable reduction in the number of media voices -- a loss that cannot necessarily be replaced. Id. Small markets are "small" because there are insufficient consumer demand and funding available to sustain numerous, diverse sources of information. Id. Regardless of market size, LMAs may result in duplicative programming.[26] And regardless of market size, the diminished revenues of singleton stations prevent them from obtaining attractive programming[27] or providing public interest services (e.g. extensive news

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[25](...continued)
competing stations that must charge even lower rates to compete. Because of their strength in the market, the dominant stations, having undermined their struggling competitors, have the ability to demand higher prices without fear of losing advertisers to other stations.

Moreover, Pegasus' argument may be valid insofar as LMAs will provide the combined party greater leverage to compete with the market-dominant station. Nevertheless, there is no consideration given to the singleton UHF station which cannot compete against either the market-dominant VHF station or the two stations participating in a LMA.

[26] See Centennial Comments at 4-5; LIN Comments at 9, 11 (There is "only a 3 to 5 percent duplication of programming" resulting from its LMA in the Hartford-New Haven market, and a "10% weekly program duplication between the stations" involved in its LMA in the Dallas-Ft. Worth, Texas market.)

[27] See Centennial Comments at 5; Jet Comments at 10. Compare Blade Comments at 10 ("Because of Blade's resources and expertise, WFTE was able to obtain high quality programming, far superior to the type of programming that a new startup UHF operation is usually able to afford."); Sinclair Comments at 7 (describing how stations which before the LMA were "running tired programming," but as a result of a LMA, were able to expand the
(continued...)

and weather coverage).[28] Unlike larger markets which can more readily absorb such losses because there are numerous other media outlets, e.g., newspapers, radio and cable, to present diverse viewpoints, small markets cannot sustain a sizeable number of any media outlets. Therefore, the lost media voice remains lost.

Further, in comparing the small markets with the larger markets, there may be only one or two more stations in the larger market. However, there will be many times the advertising revenue in the larger market. Therefore, the available advertising revenue per station in the small market is vastly less than the available advertising revenue per station in the larger market. Accordingly, a singleton station in a larger market will be able to find sources of revenue that are ignored by the major stations and LMA partners in the larger market. However, in the small markets, there are no ignored sources of revenue for the singleton station to tap. As such, it is economically unable to compete with an LMA group in the small market.

While Jet does not take issue with the belief that LMAs can enhance competition and diversity in larger television markets, it cannot emphasize enough that the same is not true in small television markets. As demonstrated above, under certain circumstances, television LMAs cause substantial harm to competition and diversity. Unfortunately, that is a substantial price to pay if the Commission allows LMAs to continue to exist in all markets, regardless of the

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[27](...continued)
amount of programming and "secure better syndicated programming").

[28] For examples of how LMAs have improved the ability of stations to provide news coverage or other public interest programming, see SJL Comments at 7-9; Waterman Comments at 3-4; AK Comments at 8-10.

number of stations in the market. While LMAs may ensure the survival of participating stations in small markets, they surely will deliver a devastating blow to many of their competitors.

C. The Congressional Intent and Grandfathering Of LMAs

1. Grandfathering Of Small Market LMAs

As previously noted, several commenting parties point to the language of the Telecom Act and its legislative history as support for their proposition that the congressional will was to grandfather LMAs. Jet does not dispute that the legislative history highlights the comments of several congressmen cited as support for the grandfathering of LMAs. But, Jet points out that the support for grandfathering was not universal. Specifically, Jet calls the Commission's attention to the statement of Representative Goss:

> With a bill this monumental, differences of opinion will inevitably continue to exist -- and the chairman himself has underscored that this is not a perfect product. . . .
>
> One remaining concern I have is with restrictions on ownership of television stations. Diversity of opinion -- and a truly free press -- are hallmarks of American society.
>
> In our rules meeting last night, the chairman said that, although the House provision on duopolies -- dual ownership of stations in a single market -- was not included, guidelines for the FCC in handling such cases were. He assured me that he would look further into the matter of <u>small television markets</u> like those in my district in southwest Florida, where the rule on dual ownership may have unintended negative consequences.

142 Cong. Rec. H1150 (daily ed. February 1, 1996) (statement of Rep. Goss) (emphasis added). While Jet is mindful that Representative Goss' statements were with respect to the duopoly rule, Jet maintains that by virtue of the fact that there are striking resemblances between LMAs and common ownership, the concern of Representative Goss should be extended to LMAs as well.

Moreover, the chairman's assurance that "he would look into the matter of small television markets" illustrates that the consequences of duopolies and LMAs in small television markets were of continued concern. Thus, while Jet acknowledges that as a general matter grandfathering of LMAs is consistent with the congressional intent, it also suggests that Congress did not intend to grandfather LMAs in small markets if they were revealed to be detrimental to the public interest and diversity.

2. Macroeconomics vs. Microeconomics

Representative Stearns, in casting his support of LMAs, described the competitive video marketplace. See 142 Cong. Rec. H1164 (daily ed. February 1, 1996). He cites the LMA as a means by which broadcasters can "meet the new competition" from other video providers. Id. Senator Inouye also spoke of the value of LMAs as a means by which broadcasters could more effectively compete with other video providers. See 142 Cong. Rec. S706 (daily ed. February 1, 1996).

Based on these statements, these legislators, in a large part, viewed LMAs as a competitive tool in the larger video marketplace.[29] The concern expressed by Jet, however, has predominantly focused on competition among television stations. However, Jet is unable to reconcile how diminished competition among television broadcasters (the inevitable consequence of grandfathering LMAs in small television markets) will act to invigorate competition among the various video providers. To stimulate competition in small markets, it makes more sense to allow economies of scale to be achieved by cross-ownership of media than to accomplish such efficiencies by allowing direct competitors to combine and amass market power within a particular medium.

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[29] See 142 Cong. Rec. H1164 (statement of Rep. Stearns)("We must provide broadcasters not only with the flexibility to compete effectively with each other but also with their competitors.").

3. The Cut-Off Date For Grandfathering

Of the parties arguing that Congress intended to grandfather LMAs, several further comment on the "cut-off" date therefor.[30] In its Second Notice of Proposed Rule Making, the Commission tentatively concluded that it was "inclined to grandfather all television LMAs entered into *before* the adoption date of this *Notice* for purposes of compliance with our ownership rules." SFNPRM at ¶ 89. Clearly, the Commission has no intention of grandfathering LMAs entered into during the period following November 5, 1996. See Id. ("[T]elevision LMAs entered into *on or after* the adoption date of this *Notice* would be entered into at the risk of the contracting parties.").

Rather, the Telecom Act's legislative history supports the use of February 8, 1996 (the date the Telecom Act was enacted) as the cut-off date for grandfathering LMAs. Specifically, the text of the *Conference Agreement* reads:

> Subsection (g) grandfathers LMAs currently in existence upon enactment of this legislation. . . . [T]his subsection assures that this legislation does not deprive the public of the benefits of existing LMAs that were otherwise in compliance with Commission regulations on the date of enactment.

H.R. Conf. Rep. 458, 104th Cong., 2d Sess. 163 (1996). Thus, since Congress specifically determined that the cut-off date for grandfathering is February 8, 1996, the Commission cannot act otherwise.

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[30] See Sinclair Comments at 4 (suggesting that all LMAs entered into prior to the promulgation of the Commission's rules shall be grandfathered); Miller Comments at 5 (offering the date the Commission enacts rules as the cut-off date for grandfathering LMAs). Compare Centennial Comments at 10 (suggesting February 8, 1996 as the cut-off date for grandfathering LMAs); LSOC Comments at xii.

Jet notes, however, that Congress was vague as to its intentions with respect to what it would consider an "existing" LMA. The problem is whether "existing" shall be construed as (1) an executed agreement; (2) an agreement which the Commission has expressly approved; or (3) "implementation" of the agreement insofar as the brokering station has commenced providing programming on the brokered station. The problem is exacerbated because of the Commission's interim policy as to television LMAs.[31]

The Commission, with limited exceptions,[32] currently reviews only those LMAs that fall within the parameters of the interim policy, which applies only in limited circumstances. All other LMAs must be kept in the station's files and are available for inspection only upon request by the Commission. FNPRM, 10 FCC Rcd 3524, 3582 (1995).

Since Congress was not more precise in defining the LMAs which would qualify for grandfathering, Jet submits that the Commission should create a two-tier standard. For those LMAs within the parameters of the interim policy, the preconditions to grandfathering should be (1) Commission approval of the arrangement by final order before February 8, 1996, and (2) implementation of the LMA before February 8, 1996. For LMAs not subject to Commission review under the interim policy, only those LMAs that were implemented as of February 8, 1996, should be grandfathered. Moreover, if, at any time, an LMA is held to be (1) in violation

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[31] See Processing of Applications Proposing Local Marketing Agreements (Public Notice), Mimeo No. 54161 (June 1, 1995).

[32] The Commission will review an LMA upon receiving information indicating an unauthorized transfer of control or a violation of the multiple ownership rules. See, e.g. Letter of Roy J. Stewart, Chief, Mass Media Bureau to Siete Grande Television, Inc. and Estrella Brillante Ltd. Co-Partnership, DA 96-2037, (released December 9, 1996).

of the multiple ownership rules or (2) an unauthorized transfer of control, such LMA shall lose its grandfathered status.[33]

This two-tier approach represents the most equitable resolution. It offers the most concrete way of defining "existing" because it indicates that the LMA has overcome all hurdles and can definitively be found to exist.

D. Jet's Proposal

Stated simply, the Commission is charged with promulgating rules that are not contrary to the congressional intent while, at the same time, preserving competition and diversity. Clearly, Congress has spoken that it intends for existing LMAs to be grandfathered. But, it is equally as clear that sweeping rules grandfathering all LMAs, regardless of the size of the market, will harm competition and diversity.

Jet believes it has the answer. In small television markets having four or fewer stations,[34] LMAs should be forbidden to the extent operation of an LMA vests in a single entity the power

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[33] For example, under the interim policy, LMAs that are part of a television assignment are subject to disclosure to the Commission. For the LMA to qualify for grandfathering, the assignment application must have been granted by final order (without the Commission finding a problem with the LMA) and the brokering station must have commenced providing programming on or before February 8, 1996.

Under the second tier, if the LMA was not subject to Commission review under the interim policy, it would qualify for grandfathering if the brokering station had already begun to provide programming on the brokered station as of February 8, 1996.

If, in either of these instances, the LMA is held to either (1) violate the multiple ownership rules or (2) constitute an unauthorized transfer of control, it shall lose its grandfathered status.

[34] Jet initially advocated using the Grade A contour to define a television station's market, thus defined its small market in accordance therewith. Jet Comments at note 2. However, insofar as the Commission decides to define a television's local market differently, Jet submits that such a defining factor could be reconciled with its proposal.

to operate one half or more of the markets stations. This would not be inconsistent with Congress' will, because the neither the text of Section 202(g) of the Telecom Act nor the language of the Conference Report requires that all LMAs be grandfathered.[35]

Thus, with respect to LMAs which allow one half or more of the television market's stations to be operated by a single entity, if they were "existing"[36] before February 8, 1996,[37] they should not be grandfathered. And, for such LMAs entered into after February 8, 1997, they should be terminated within 90 days of the effective date of the Commission's rules and forbidden in the future.

V. Conclusion

The record clearly supports repeal of the cross-ownership rule as a means to fuel competition without sacrificing diversity. However, Jet cautions the Commission as to its proposals regarding television LMAs. Jet appreciates that LMAs in larger markets can invigorate cross-media competition and even competition among television stations without a concomitant negative impact on diversity. But, Jet strenuously objects to any Commission decision to grandfather all LMAs, regardless of their effect on competition and diversity. Based on the experience of Jet, LMAs which vest in a single entity the authority to operate one half

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[35] See Telecommunications Act of 1996, § 202(g), Pub. L. No. 104-104, 110 Stat. 56, 111 (1996); H.R. Conf. Rep. 458, 104th Cong., 2d Sess. 163 (1996).

[36] See discussion Section IV, subsection C, part 3, for definition of "existing."

[37] Only those LMAs that existed at the time Congress enacting the Telecom Act, February 8, 1996, are qualified for grandfathering. See H.R. Conf. Rep. 458, 104th Cong., 2d Sess. 163 (1996) ("Subsection (g) grandfathers LMAs currently in existence upon enactment of this legislation.").